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Part IV: Environmental Protection Agency, *Interim Policy on Compliance Incentives for Small Businesses; Notice.*ENVIRONMENTAL PROTECTION
AGENCY

[FRL-5512-7]

Interim Policy on Compliance Incentives
for Small BusinessesAGENCY: Office of Enforcement and
Compliance Assurance, EPA.
ACTION: Notice of final policy.

SUMMARY: The Office of Enforcement and Compliance Assurance (EPA) is issuing this Final Policy on Compliance Incentives for Small Businesses. This Final Policy is intended to promote environmental compliance among small businesses by providing them with incentives to participate in compliance assistance programs or to conduct environmental audits and to then promptly correct violations. The Policy accomplishes this in two ways: by setting forth guidelines for the Agency to reduce or waive penalties for small businesses that make good faith efforts to correct violations, and by providing guidance for States and local governments to offer these incentives.

EFFECTIVE DATE: This Policy is effective June 10, 1996.

FURTHER INFORMATION CONTACT: David Hindin, 202-564-2235, Office of Regulatory Enforcement, Mail Code 2248-A, or Karin Leff, 202-564-7068, Office of Compliance, Mail Code 2224-A, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION: Pursuant to this Policy, EPA will refrain from initiating an enforcement action seeking civil penalties, or will mitigate civil penalties, whenever a small business makes a good faith effort to comply with

environmental requirements by receiving on-site compliance assistance or promptly disclosing the findings of a voluntarily conducted environmental audit, subject to certain conditions. These conditions require that the violation: is the small business's first violation of the particular requirement; does not involve criminal conduct; has not and is not causing a significant health, safety or environmental threat or harm; and is remedied within the corrections period. Moreover, EPA will defer to State actions that are consistent with the criteria set forth in this Policy.

This Final Policy supersedes the Interim version of the Policy issued in June 1995. See 60 FR 32675, June 23, 1995. The Agency revised the Interim version based on the comments we received from the public in response to the Federal Register notice, as well as the comments we received from EPA Regional offices and States. The major change in this final version of the Policy is to allow small businesses to obtain the penalty relief provided by this Policy not only by using on-site compliance assistance, but also by conducting an environmental audit, and promptly disclosing and correcting the violations. There are two reasons for this change. First, this addresses the major criticism of the Interim Policy that there are few on-site compliance assistance programs sponsored or run by government agencies. Thus, this change enables more small businesses to use the Policy. Second, fairness suggests that if small businesses who seek tax-payer funded compliance assistance from the government can get penalty relief, then businesses who spend their own money to do an audit, should be able to get similar relief.

We also have slightly modified the penalty relief guidelines in section F of the Policy. Guidelines 1 and 2 remain the same as they were in the June 1995 Interim version. We have added a new third guideline which states:

3. If a small business meets all of the criteria, except it has obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of any economic benefit associated with the violations. EPA retains this discretion to ensure that small businesses that comply with public health protections are not put at serious marketplace disadvantage by those who have not complied. EPA anticipates that this will occur very infrequently.

This new guideline is necessary to ensure that we continue to provide a national level playing field. Small businesses that make significant expenditures to comply with the law should not be put at an economic disadvantage by those who did not comply. Most of the other changes in the final Policy are clarifications or editorial in nature. The entire text of the Policy appears below.

Dated: May 10, 1996.
Steven A. Herman,
Assistant Administrator, Office of
Enforcement and Compliance Assurance,
United States Environmental Protection
Agency.

A. Introduction

This document sets forth the U.S. Environmental Protection Agency's Policy on Compliance Incentives for Small Businesses. This Policy is one of the 25 regulatory reform initiatives announced by President Clinton on March 16, 1995, and implements, in part, the Executive Memorandum on Regulatory Reform, 60 FR 20621, April 26, 1995. The Executive Memorandum provides in pertinent part:

To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a

portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amounts waived are used to bring the entity into compliance. The provisions [of this paragraph] shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment.

This Policy also implements section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996, signed into law by the President on March 29, 1996.

As set forth in this Policy, EPA will refrain from initiating an enforcement action seeking civil penalties, or will mitigate civil penalties, whenever a small business makes a good faith effort to comply with environmental requirements by receiving compliance assistance or promptly disclosing the findings of a voluntarily conducted environmental audit, subject to certain conditions. These conditions require that the violation: is the small business's first violation of the particular requirement; does not involve criminal conduct; has not and is not causing a significant health, safety or environmental threat or harm; and is remedied within the corrections period. Moreover, EPA will defer to State actions that are consistent with the criteria set forth in this Policy.

B. Background

The Clean Air Act (CAA) Amendments of 1990 require that States establish Small Business Assistance Programs (SBAPs) to provide technical and environmental compliance assistance to stationary sources. On August 12, 1994, EPA issued an enforcement response policy for stationary sources which provided that an authorized or delegated state program may, consistent with federal requirements, either:

(1) Assess no penalties against small businesses that voluntarily seek compliance assistance and correct violations revealed as a result of compliance assistance within a limited period of time; or

(2) Keep confidential information that

identifies the names and locations of specific small businesses with violations revealed through compliance assistance, where the SBAP is independent of the state enforcement program.

In a further effort to assist small businesses to comply with environmental regulations, and to achieve health, safety, and environmental benefits, the Agency is adopting a broader policy for all media programs, including water, air, toxics, and hazardous waste.

C. Purpose

This Policy is intended to promote environmental compliance among small businesses by providing incentives for them to participate in on-site compliance assistance programs and to conduct environmental audits. Further, the Policy encourages small businesses to expeditiously remedy all violations discovered through compliance assistance and environmental audits. The Policy accomplishes this in two ways: by setting forth a settlement penalty Policy that rewards such behavior, and by providing guidance for States and local governments to offer these incentives.

D. Applicability

This Policy applies to facilities owned by small businesses as defined here. A small business is a person, corporation, partnership, or other entity who employs 100 or fewer individuals (across all facilities and operations owned by the entity).¹ This definition is a simplified version of the CAA Sec. 507 definition of small business. On balance, EPA determined that a single definition would make implementation of this Policy straightforward and would allow for consistent application of the Policy in a multimedia context.

This Policy is effective June 10, 1996 and on that date supersedes the Interim version of this Policy issued on June 13, 1995 and the September 19, 1995 Qs and As guidance on the Interim version. This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental

¹The number of employees should be considered as full-time equivalents on an annual basis, including contract employees. Full-time equivalents means 2,000 hours per year of employment. For example, see 40 CFR §372.3.

statutes and regulations that EPA administers, except for the Public Water System Supervision Program under the Safe Drinking Water Act.² This Policy applies to all such actions filed after the effective date of this Policy, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the amount of the civil penalty.

This Policy sets forth how the Agency expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate civil settlement penalty for violations by small businesses. It states the Agency's views as to the proper allocation of enforcement resources. This Policy is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This Policy is to be used for settlement purposes and is not intended for use in pleading, or at hearing or trial. To the extent that this Policy may differ from the terms of applicable enforcement response policies (including penalty policies) under media-specific programs, this document supersedes those policies. This Policy supplements, but does not supplant the August 12, 1994 Enforcement Response Policy for Treatment of Information Obtained Through Clean Air Act Section 507 Small Business Assistance Programs.

E. Criteria for Civil Penalty Mitigation

EPA will eliminate or mitigate its settlement penalty demands against small businesses based on the following criteria:

1. The small business has made a good faith effort to comply with applicable environmental requirements as demonstrated by satisfying either a. or b. below.

a. Receiving on-site compliance assistance from a government or government supported program that offers services to small businesses (such as a SBAP or state university), and the violations are detected during the

²This Policy does not apply to the Public Water System Supervision (PWSS) Program because it already has an active compliance assistance program and EPA has a policy to address the special needs of small communities. See November 1995 Policy on Flexible State Enforcement Response to Small Community Violations.

compliance assistance. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency.

b. conducting an environmental audit (either by itself or by using an independent contractor) and promptly disclosing in writing to EPA or the appropriate state regulatory agency all violations discovered as part of the environmental audit pursuant to section H of this Policy.

For both a. and b. above, the disclosure of the violation must occur before the violation was otherwise discovered by, or reported to the regulatory agency. See section I.1 of the Policy below. Good faith also requires that a small business cooperate with EPA and provide such information as is necessary and requested to determine applicability of this Policy.

2. This is the small business's first violation of this requirement. This Policy does not apply to businesses that have previously been subject to an information request, a warning letter, notice of violation, field citation, citizen suit, or other enforcement action by a government agency for a violation of that requirement within the past three years. This Policy does not apply if the small business received penalty mitigation pursuant to this Policy for a violation of the same or a similar requirement within the past three years. If a business has been subject to two or more enforcement actions for violations of environmental requirements in the past five years, this Policy does not apply even if this is the first violation of this particular requirement.

3. The business corrects the violation within the corrections period set forth below.

Small businesses are expected to remedy the violations within the shortest practicable period of time, not to exceed 180 days following detection of the violation. However, a small business may take an additional period of 180 days, i.e., up to a period of one year from the date the violation is detected, only if necessary to allow a small business to correct the violation by implementing pollution prevention measures. For any violation that cannot be corrected within

90 days of detection, the small business should submit a written schedule, or the agency should issue a compliance order with a schedule, as appropriate. Correcting the violation includes remediating any environmental harm associated with the violation,³ as well as implementing steps to prevent a recurrence of the violation.

4. The Policy applies if:

a. The violation has not caused actual serious harm to public health, safety, or the environment; and

b. The violation is not one that may present an imminent and substantial endangerment to public health or the environment; and

c. The violation does not present a significant health, safety or environmental threat (e.g., violations involving hazardous or toxic substances may present such threats); and

d. The violation does not involve criminal conduct.

F. Penalty Mitigation Guidelines

EPA will exercise its enforcement discretion to eliminate or mitigate civil settlement penalties as follows.

1. EPA will eliminate the civil settlement penalty in any enforcement action if a small business satisfies all of the criteria in section E.

2. If a small business meets all of the criteria, except it needs a longer corrections period than provided by criterion 3 (i.e., more than 180 days for non-pollution prevention remedies, or 360 days for pollution prevention remedies), EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of any economic benefit associated with the violations.⁴

3. If a small business meets all of the criteria, except it has obtained a significant economic benefit from the

³If significant efforts will be required to remediate the harm, the Policy will not apply since criterion 4 is likely not to have been satisfied.

⁴The "gravity component" of the penalty includes everything except the economic benefit amount. In determining the appropriate amount of the gravity component of the penalty to mitigate, EPA should consider the nature of the violations, the duration of the violations, the environmental or public health impacts of the violations, good faith efforts by the small business to promptly remedy the violation, and the facility's overall record of compliance with environmental requirements.

violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of the significant economic benefit associated with the violations. EPA retains this discretion to ensure that small businesses that comply with public health protections are not put at a serious marketplace disadvantage by those who have not complied. EPA anticipates that this situation will occur very infrequently.

If a small business does not fit within guidelines 1, 2 or 3 immediately above, this Policy does not provide any special penalty mitigation. However, if a small business has otherwise made a good faith effort to comply, EPA has discretion, pursuant to its applicable enforcement response or penalty policies, to refrain from filing an enforcement action seeking civil penalties or to mitigate its demand for penalties.⁵ Further, these policies allow for mitigation of the penalty where there is a documented inability to pay all or a portion of the penalty, thereby placing emphasis on enabling the small business to finance compliance. See Guidance on Determining a Violator's Ability to Pay a Civil Penalty of December 1986. Penalties also may be mitigated pursuant to the Interim Revised Supplemental Environmental Projects Policy of May 1995 (60 F.R. 24856, 5/10/95) and Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Policy of December 1995 (60 FR 66706, December 22, 1996).

G. Compliance Assistance

1. Definitions and Limitations

Compliance assistance⁶ is information or assistance provided by EPA, a State or another government agency or government supported entity to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include enforcement inspections or enforcement

⁵For example, in some media specific penalty policies, if good faith efforts are undertaken, the penalty calculation automatically factors in such efforts through a potentially smaller economic benefit or gravity amount.

⁶Compliance assistance is sometimes called compliance assessments or technical assistance.

actions.⁷

In its broadest sense, the content of compliance assistance can vary greatly, ranging from basic information on the legal requirements to specialized advice on what technology may be best suited to achieve compliance at a particular facility. Compliance assistance also may be delivered in a variety of ways, ranging from general outreach through the Federal Register or other publications, to conferences and computer bulletin boards, to on-site assistance provided in response to a specific request for help.

The special penalty mitigation considerations provided by this Policy only apply to civil violations which were identified as part of an on-site compliance assistance visit to the facility. If a small business wishes to obtain a corrections period after receiving compliance assistance from a confidential program, the business must promptly disclose the violations to the appropriate regulatory agency and comply with the other provisions of this Policy. This Policy is restricted to on-site compliance assistance because the other forms of assistance (such as hotlines) do not expose a small business to an increased risk of enforcement and do not provide the regulatory agency with a simple way to determine when the violations were detected and thus when the violations must be corrected. In short, small businesses do not need protection from penalties as an incentive to use the other types of compliance assistance.

2. Delivery of On-Site Compliance Assistance by Government Agency or Government Supported Program

Before on-site compliance assistance is provided under this Policy or a similar State policy, businesses should be informed of how the program works and their obligations to promptly remedy any violations discovered. Ideally, before on-site compliance assistance is provided pursuant to this Policy or similar State policy, the agency should provide the facility with a document (such as this Policy) explaining how the program

works and the responsibilities of each party. The document should emphasize the responsibility of the facility to remedy all violations discovered within the corrections period and the types of violations that are excluded from penalty mitigation (e.g., violations that caused serious harm). The facility should sign a simple form acknowledging that it understands the Policy. Documentation explaining the nature of the compliance assistance visit and the penalty mitigation guidelines is essential to ensure that the facility understands the Policy.

At the end of the compliance assistance visit, the government agent should provide the facility with a list of all violations observed and report within 10 days any additional violations identified resulting from the visit, but not directly observed, e.g., results from review and analysis of data or information gathered during the visit. Any violations that do not fit within the penalty mitigation guidelines in the Policy--e.g., those that caused serious harm--should be identified. If the violations cannot all be corrected within 90 days, the facility should be requested to submit a schedule for remedying the violations or a compliance order setting forth a schedule should be issued by the agency.

3. Requests for On-Site Compliance Assistance

EPA, States and other government agencies do not have the resources to provide on-site compliance assistance to all small businesses that request such assistance. This Policy does not create any right or entitlement to compliance assistance. A small business that requests on-site compliance assistance will not necessarily receive such assistance. If a small business requests on-site compliance assistance (or any other type of assistance) and the assistance is not available, the government agency should provide a prompt response indicating that such assistance is not available. The small business should be referred to other public and private sources of assistance that may be available, such as clearinghouses, hotlines, and extension services provide by some universities. In addition, the small business should be informed that it may obtain the benefits offered by this

Policy by conducting an environmental audit pursuant to the provisions of this Policy.

H. Environmental Audits

For purposes of this Policy, an environmental audit is defined as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." See EPA's new auditing policy, entitled Incentives for Self-Policing, 60 FR 66706, 66711, December 22, 1995.

The violation must have been discovered as a result of a voluntary environmental audit, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the Policy does not apply to:

- (1) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
- (2) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or
- (3) violations discovered through an audit required to be performed by the terms of a consent order or settlement agreement.

The small business must fully disclose a violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA or the appropriate state or local government agency.

I. Enforcement

To ensure that this Policy enhances and does not compromise public health and the environment, the following conditions apply:

1. Violations detected through inspections, field citations, reported to an agency by a member of the public or a "whistleblower" employee, identified in notices of citizen suits, or previously reported to an agency as required by applicable regulations or permits, remain

⁷Of course, during an inspection or enforcement action, a facility may receive suggestions and information from the regulatory authority about how to correct and prevent violations.

fully enforceable.

2. A business is subject to all applicable enforcement response policies (which may include discretion whether or not to take formal enforcement action) for all violations that had been detected through compliance assistance and were not remedied within the corrections period. The penalty in such action may include the time period before and during the correction period.

3. A State's or EPA's actions in providing compliance assistance is not a legal defense in any enforcement action. This Policy does not limit EPA or a state's discretion to use information on violations revealed through compliance assistance as evidence in subsequent enforcement actions.

4. If a field citation is issued to a small business (e.g., under the Underground Storage Tank program⁸), the small business may provide information to the Agency to show that specific violations cited in the field citation are being remedied under a corrections schedule established pursuant to this Policy or similar State policy. In such a situation, EPA would exercise its enforcement discretion not to seek civil penalties for those violations.

date of this Policy, EPA will conduct a study of the effectiveness of this Policy in promoting compliance among small businesses. EPA will make the study available to the public. EPA will make publicly available the terms of any EPA agreements reached under this Policy, including the nature of the violation(s), the remedy, and the schedule for returning to compliance.

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J. Applicability to States⁹

EPA recognizes that states are partners in enforcement and compliance assurance. Therefore, EPA will defer to state actions in delegated or approved programs that are generally consistent with the criteria set forth in this Policy. Whenever a State agency provides a correction period to a small business pursuant to this Policy or a similar policy, the agency should notify the appropriate EPA Region.

This notification will assure that federal and state enforcement responses are properly coordinated.

K. Public Accountability

Within three years of the effective

⁸The Underground Storage Tank (UST) field citation program provides for substantially reduced penalties in exchange for the rapid correction of certain UST violations for first time violators. See *Guidance for Federal Field Citation Enforcement, OSWER Directive 9610.6, October 1993*.

⁹States includes tribes.